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In the Supreme Court of the United States

OCTOBER TERM 1968

No......

CLAUDE W. MARTIN,
Petitioner,

v.

STATE OF WASHINGTON,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of the State of Washington

COMES NOW, Claude W. Martin and respectfully prays the Court that a Writ of Certiorari shall be issued to review the judgment of the Supreme Court of the State of Washington entered on July 16, 1968 denying Petition for Rehearing of this Petitioner, thereby affirming the judgment of conviction of Petitioner.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Washington is set forth in Appendix A, pp. 1a through 15a and appears as *State vs. Martin* 440 P. 2d, 429.

Petitioner's petition for rehearing addressed to the

Supreme Court of the State of Washington is set forth in complete context, as Appendix B, pp. 16b to 37b.

JURISDICTION

The petitioner invokes the jurisdiction of this Court under 28 USC, Sec. 1257 (3) to review the denial of the petition for a Rehearing of the judgment of the Supreme Court of the State of Washington affirming petitioner's conviction of "Hit and Run".

On July 16, 1968 the Supreme Court of the State of Washington denied without Opinion Petition for Rehearing of its judgment against Petitioner.

STATUTE INVOLVED

Title 28 USC, Section 1257 (3)

". . . Final judgments or decrees rendered by the highest courts of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

"...

" (3) By Writ of Certiorari . . . where any title, right, privilege or immunity is specifically set up or claimed under the Constitution. . . "

June 25, 1948, C 646, 62 Stat. 929."

QUESTIONS PRESENTED

1. Where the State refused to grant immunity to its out of state witnesses or to procure their presence under the Uniform Out of State Witness Act because

it had a tape recording of the testimony of these prosecuting witnesses and believed it less expensive to use the tape recorded testimony than to obtain these witnesses under the Act, is this not a deprivation of Petitioner's rights under the Sixth Amendment and denial of due process under the Fourteenth Amendment of the Constitution of the United States?

2. Is Petitioner deprived of his constitutional rights under the Sixth Amendment and denied due process under the Fourteenth Amendment where the trial court refused Petitioner's requested instruction which contained a correct statement of law of the case and instead gave an admittedly erroneous instruction on one of the essential factual elements of the crime charged?

3. Is Petitioner in a criminal action denied his constitutional guarantee against unlawful arrest and unreasonable search and seizure under the Fourth Amendment and denied due process under the Fourteenth Amendment where the arresting officer intended to apprehend Petitioner before it could be determined whether or not Petitioner was in fact exceeding the speed limit and thereafter took Petitioner into custody under the guise of an arrest for speeding in order to gain control of the Petitioner and his vehicle?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution:

Amendment Four,

Amendment Six,

Amendment Fourteen.

STATEMENT OF THE CASE

1. Identification: For brevity the Justice of the Peace Court, Moses Lake District, Grant County, Washington (not a court of record) will be referred to as the Justice Court.

2. The Superior Court of the State of Washington for Grant County, a court of general jurisdiction, will be referred to as the Trial Court.

3. The Supreme Court of the State of Washington, Washington's court of last resort, will be referred to as the State Court.

4. The State of Washington, plaintiff below, will be referred to as the State.

5. Claude W. Martin, defendant below, will be referred to as the Petitioner.

6. Identification of the record is set forth in foot note.*

Petitioner was adjudged guilty of hit and run, in the Justice Court sitting without a jury and appealed to the Trial Court to obtain a trial de novo before a jury as a matter of right.

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*"R" refers to the record of the testimony; "Tr." refers to the transcript of the pleadings; "Appendix A" refers to the decisions of the State Court; "Appendix B" is the full context of Petition for Rehearing Constitutional provisions and excerpts from Exhibits 14 and 15; "Appendix A and B" are separately designated for identification but paged in numerical sequence.

Prior to trial, the Trial Court denied Petitioner's motion to supress evidence (R. 35, 36).

The Petitioner renewed and the Trial Court denied motions to suppress evidence when the trial opened and again when the State closed its case. (R. 38, 39, 233, 248).

Trial, before the jury commenced May 9, 1966. (R. 37). The State's witnesses Ben Coleman, a convicted murderer and Don Morgan, his nephew were arrested by the State approximately one week before subpoenas were issued for them and each was released on bail. Neither were present at trial and Petitioner was denied his right to be confronted by these witnesses and to cross-examine them. (R. 145, 172). Approximately one month before trial the State learned that the witnesses were in Clovis, New Mexico. (R. 147, 149, 150, 151). The State did not intend to procure these witnesses and no attempt on the part of the State was made to obtain their presence under the *Uniform Out of State Witness Act*. The State sought to excuse its lack of diligence on the ground that the State knew of the existence of the tape recording of the testimony of the two witnesses and believed it less expensive to use the tape recording than to invoke the Uniform Act. The State admitted it would not grant these witnesses immunity to return to the State of Washington to testify which is a prerequisite under the Uniform Act to obtain out of state witnesses. (R. 152). The State further admitted that part of the tape recording of the two witnesses was unintelligible. (R. 161). Petitioner claimed his right of confrontation under the

constitution and claimed lack of diligence on the part of the State. (R. 154, 155, 163, 164).

The Trial Court refused to give Petitioner's requested instruction to the effect that knowledge of an accident is an essential element of the crime of hit and run under Section 46.52.020 of the *Revised Code of Washington*. (R. 284, 285).

The Trial Court erroneously instructed the jury to the effect that knowledge of the accident was immaterial. (R. 293). The State Court ruled on appeal that knowledge is an essential element of the crime charged; that the offending instruction No. 8 was an erroneous statement of law (App. A p. 12a) but that this constituted harmless error (App A p. 15a). (Instruction No. 8 in full context appears at R. 293 and App B p. 17b).

FEDERAL QUESTIONS RAISED

1. Petitioner raised and preserved his right of confrontation under the Sixth and Fourteenth Amendments during trial and in the State Court. (R. 154, 155, 163, 164) (App. A p. 1a) and by Assignment of Error No. 8. (Petitioner's State Court brief page 13).

2. Petitioner could not raise the question of deprivation of his Constitutional rights resulting from the State Court's adoption of the "Harmless Error Formula" until his Petition for Rehearing to the State Court, which was denied without opinion. (App. B pp. 16b to 37b). The harmless error formula was not raised by the State at any time during the trial or on

appeal. Petitioner excepted to the failure of the Trial Court to give Petitioner's Instruction No. C (R. 284, 285) and excepted to the giving of State's Instruction No. 8. (R. 293). Petitioner preserved his position in the State Court by Assignments of Error No. 9, 10 and 11. (Petitioner's State Court Brief pp. 7 and 8).

3. Petitioner raised and preserved his constitutional rights under the Fourth and Fourteenth Amendments by motion to suppress evidence prior to trial, during trial, and in the State Court. (R. 35, 36, 38, 39, 233, 248) Tr. 7) (App. A p. 1a) (Assignment of Error 1) (Tr. 7) (R. 38, 233, 248) (Assignment of Error 2) (R. 58, 59) (Assignment of Error 3) (Ex. 3, 4, 5, 6 and 7) (R. 73-75) (Assignment of Error 4) (R. 35, 36, 38, 39, 73-75, 76-77, 81, 103, 104, 123, 124, 125, 126, 135).

REASONS FOR GRANTING THE WRIT

1. Petitioner stands deprived of his rights of confrontation of witnesses under the Sixth and Fourteenth Amendments:

It is admitted by the State that it made no attempt to procure its out of state witnesses pursuant to Section 10.55.060 *Revised Code of Washington* and did not intend to do so. The State intended to use its tape recording of the testimony and intended to refuse to grant the witnesses immunity to return. The criminal charge filed by the State against these witnesses induced them to leave the State. (R. 152, 154, 164).

If this Court's ruling in *Barber v. Page .... US....*, Case No. 703 decided April 23, 1968 is applied, the Trial

Court ruling and the State Court's decision is a flagrant violation of Petitioner's right to confront witnesses against him.

2. Petitioner stands deprived of his Constitutional right to have the trial jury pass on an essential factual element of the crime charged.

The State Court ruled that knowledge on the part of the accused is an essential element of the crime of Hit and Run under Section 46.52.020 *Revised Code of Washington,* and that " . . . it was error to submit to the jury Instruction No. 8" . . . to the jury. (App. A p. 12a). Petitioner's requested instruction, although a correct statement of law, was denied. (R. 284, 285). Applying this Court's ruling in *Morissette v. US,* 342 US 246, *Gilmer and others v. Higley,* 110 US 47 (1884), *Kotteakos v. US,* 328 US 750, and *Bollenbach v. US,* 326 US 607, the ruling of the Trial Court and the State Court not only deprived the Petitioner of his right to have the jury determine the facts, but deprived him of his defense. The admittedly erroneous instruction which misinformed the jury as to an essential element of the crime charged should not be lightly brushed aside by the "Harmless Error Formula." The offending Instruction No. 8 was an erroneous statement of the law. It affected the outcome of the case as shown by the affidavits of the foreman and two other members of the jury. (App. B pp. 35b, 36b, 37b).

Under Washington Law, Sections 4.44.090, and 10.49.020 *Revised Code of Washington,* the Petitioner

had a right to have the jury determine the facts after being properly instructed as to the law of the case. The erroneous instruction was neither trivial, formal, nor accidentally given. By Instruction No. 8 the jury was informed that lack of knowledge of the accident, an essential element of the crime charged, is no defense to the crime charged. The question of Petitioner's knowledge or lack of knowledge of the accident was thereby withdrawn from the consideration of the jury. The action of the Trial Court is tantamount to a directed verdict on the element of knowledge. The State maintained at the Trial Court level and on appeal that knowledge of the accident was not an essential element of the crime charged. The Trial Court erroneously so ruled. By its ruling and decision, the Trial and State Court usurped the proper function of the jury and determined an issue of fact which is the exclusive function of the jury. If the State Court's ruling is followed to its logical conclusion the Washington Trial and appellate courts can disregard substantial errors of law committed during trial and direct a verdict of guilty against a defendant charged with a criminal act and thereby dispense with our jury system. Instruction No. 8 was not timely requested, but was included by the Trial Court at the insistence of the State over the objection and exception of the Petitioner. (R. 275, 275a, 276, 278, 283). After the case was closed and after the instructions to the jury had been handed to Counsel and after the State failed to prove Petitioner had any knowledge of the accident, the State insisted that Instruction No. 8 be given and that the jury be instructed that knowl-

edge of the accident was immaterial. The State's requested instruction was then granted.

3. Petitioner was apprehended under the guise of a speeding charge, his arrest was unlawful and the search and seizure was not incidental to the speeding charge. The evidence seized became the fruit of an unlawful arrest, search and seizure.

The State Court disregarded its ruling expressed in both *State v. Miles,* 29 Wn 2d 921, 190 P2d 740, (1948) and *State v. Michaels,* 60 Wn 2d 638, 374 P2d 989 (1962) which hold that an arresting officer must strictly comply with the law pertaining to search and seizure; that a search is reasonable and incidental to arrest if made by the arresting officer for the purpose of obtaining evidence of the crime for which the arrest was made. The State had no evidence and therefore failed to produce any evidence seized which was incidental to the arrest for speeding. The arresting officer did not contend that he ever intended by his arrest and search to obtain any evidence to prove the speeding charge. The arresting officer had made up his mind to stop Petitioner and investigate the car before he could have ascertained whether or not the Petitioner violated the speed limit. (R. 90). The arresting officer admitted that his investigation pertaining to the speeding charge terminated when the Petitioner was stopped. (R. 11, 25, 121, 128). What search under the circumstances could reasonably be incidental to an arrest for speeding?

The State Court of Washington has adopted the Federal Rule announced in *US v. Di Re* 332 US 581 and *Johnson v. US,* 333 US 10. The rulings announced in both *State v. Miles,* supra and *State v. Michaels,* supra coincide with the rule set forth in *Preston v. US,* 376 US 364. Petitioner was arrested without warrant for hit and run at approximately 1:30 A.M., July 7, 1965, immediately taken into custody, placed in the City Jail at Moses Lake, physically searched and locked in a cell before a warrant of any kind was issued. (R. 2, 3, 13, 15). The alleged hit and run did not take place in the presence of the arresting officer. (R. 110). The arresting officer admitted he wanted the car at the police station to take another look at it and to detain the defendant at the police station so he could ask him more questions specifically relating to the question of hit and run. (R. 23).

The Petitioner was in custody and out of possession of his automobile at all times after he was apprehended and taken to the police station. (R. 34). No search warrant was ever obtained. (R. 110, 111, 118-121). As set forth in *State v. Miles,* supra, the Washington Court holds that it is against the dignity of the State and against public policy to use evidence improperly procured; that an arrest for a gross misdemeanor cannot be made without a warrant when committed out of the presence of an arresting officer; and that the search of an automobile is unlawful where it is not made incidental to a lawful arrest to obtain evidence for which the arrest was made. *State v. Miles,* supra, cites and adheres to the rule expressed in *Gouled v. US,* 255 US 298, and *US v. Di Re,* 322 US 581. The

Supreme Court of the State of Washington announced in *State v. Michaels*, supra, " . . . an arrest may never be used as a pretext to search for evidence," and cited *US v. Lefkowitz*, 285 US 452. It is submitted that the record compels the observation that the arrest for speeding was used as a pretext to search for evidence of Hit and Run — not speeding.

CONCLUSION

In conclusion, we respectfully submit that this Petition for Writ of Certiorari should be granted for the following reasons:

1. Petitioner was deprived of his right to be confronted with witnesses against him as provided by the Sixth and Fourteenth Amendments.

2. Petitioner was deprived of his right too have the jury pass on an essential factual element of the crime charged as provided by the Sixth and Fourteenth Amendments.

3. Petitioner was deprived of his federal constitutional rights by the use of evidence procured as a result of an unlawful arrest, search and seizure in violation of the Fourth and Fourteenth Amendments.

Dated October 3, 1968.

Respectfully submitted,

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APPENDIX A:

Opinion of the Supreme Court of the State of Washington.

WARD, *J.*†—The defendant was charged in justice court in the city of Moses Lake with speeding, a misdemeanor, and with the gross misdemeanor defined in RCW 46.52.020, generally referred to as the hit and run statute. He was convicted in justice court on both counts, and on appeal was again convicted on both counts in the superior court, and now appeals from the judgment entered on the jury's verdict.

The defendant's 14 assignments of error may be grouped for discussion as follows: (1) Error in denying defendant's motion to suppress evidence made before the commencement of trial; (2) errors in the admission and rejection of evidence during the trial; (3) error in the giving of instructions to the jury; (4) failure of the state to make a prima facie case on either count.

The facts which are pertinent to the issues raised are as follows. On July 6, 1965, at about 9 p.m., Airman Ed Downs was riding his black Honda motorcycle near the entrance to Larson Air Force Base, near Moses Lake. He was struck from the rear by a car. His motorcycle was thrown 75 feet from the highway and Airman Downs landed along side the road about

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†Judge Ward is serving as a judge pro tempore of the Supreme Court pursuant to Art. 4, § 2(a) (amendment 38, state constitution.

110 feet from where he was struck. He sustained a broken leg and other injuries, but dragged himself to the edge of the highway where he was able to flag down a passing car by waving the white helmet which he wore at the time of the accident. He was given first aid by a passenger in the car that stopped. A piece of metal chrome auto stripping, one end of which was embedded about 3 inches in his buttocks was withdrawn and given to State Trooper Robert McBride who investigated the accident.

The automobile which struck Airman Downs did not stop at the scene of the accident and Airman Downs did not see the automobile. The only means of identification at that time was the strip of metal chrome which showed some light blue paint on its surface.

At about 1:30 a.m., July 7, 1965, Trooper McBride was operating a radar check for speeders near one of the entrances to Larson Air Force Base and observed the defendant's car. He stopped his patrol car, took a radar reading and determined that the car was traveling 50 miles per hour in a 40-miles-per-hour zone. Trooper McBride overtook the speeding car and informed the driver, who was the defendant, that he would be arrested for speeding. Walking to the front of defendant's car, Trooper McBride noted that the right front fender of the car was dented, that a part of the chrome strip was missing, that there was black paint on the fender, and that this damaged area on the defendant's car appeared to be the only part of the car not covered by a coating of mud. Trooper McBride straightened out the piece of chrome stripping which

was in his possession and noted that in length it matched the chrome missing from defendant's damaged right front fender. When asked about the missing chrome strip, defendant claimed that he ran into a ditch in Okanogan several days previously and disclaimed any knowledge of any hit and run accident.

The defendant was then requested to follow the trooper to Moses Lake in his own car, and at the Moses Lake police department, the defendant was issued a citation for speeding and for having a loaded gun in the car. The trooper then went to the home of the justice of the peace in Moses Lake and at about 2:30 a.m., filed a complaint against the defendant under the hit and run statute and obtained a warrant for his arrest. The defendant was thereupon arrested on the hit and run charge and fully advised of his constitutional rights, after which the defendant stated that he had been home all evening and that no one had used his car. The following day photographs were taken of the defendant's automobile, some with the motorcycle placed in juxtaposition to the damaged fender. Paint samples were taken from the defendant's car and sent with paint samples from the piece of metal chrome to the crime laboratory in Spokane for analysis and comparison. The two samples of paint registered almost identical readings on the spectograph.

The charge against the defendant for carrying a loaded weapon in a vehicle was dismissed and the loaded gun was not offered in evidence.

The defendant presented a pretrial motion to "sup-

press the testimony of Robert McBride and to suppress all additional physical evidence obtained by the said Robert McBride as the result of the unlawful arrest, search and seizure of defendant and defendant's 1956 Chevrolet Station Wagon . . . ." Defendant's counsel expressed the theory supporting his motion in the affidavit which he filed as follows:

> [T]he charge of speeding placed against the defendant was a ruse in attempt to obtain possession of the defendant and his automobile without warrant, and that the evidence unlawfully obtained by said officer was obtained as the result of an illegal search and seizure while said automobile was unlawfully under the control of said officer.

On the pretrial hearing the defendant testified that he was not arrested for speeding when stopped by the officer, but was arrested as a hit and run driver. State Trooper McBride testified that the sequence of the two arrests was as set out in the foregoing statement of facts. The trial court chose to believe the testimony of Trooper McBride rather than the testimony of the defendant. There was substantial evidence to sustain the trial court's conclusion. Neither did the trial court believe that the arrest for speeding was merely a ruse by which the arresting officer sought to illegally obtain evidence of hit and run. We find nothing in the record which would justify us in setting aside the trial court's conclusion.

It may be noted that the jury found the evidence sufficient to convict the defendant on the speeding charge. The defendant appeals from the conviction on both counts, but in his brief he devotes to a discus-

sion of the conviction of speeding one paragraph consisting of four lines without specific assignment of error and without citation of authorities. We cannot take his appeal on the speeding charge any more seriously than does the defendant himself.

The defendant urges that this case should be disposed of under the rule of *State v. Michaels,* 60 Wn.2d 638, 644, 374 P.2d 989 (1962): "An arrest may not be used as a pretext to search for evidence." It will be noted, however, that there was a vital difference in the facts in *State v. Michaels.* In that case the court said at 644: "In the present case there is no pretense that the arrest was made with any idea in mind except to gain access to the automobile and search it; . . . ." Also, at 645:

> The evidence in this case conclusively shows that the arrest was made for the sole purpose of searching the automobile to ascertain whether it contained any contraband property. It was a mere pretext for the search and was therefore unlawful. Consequently, the defendant's motions to suppress should have been granted.

In one other important respect, *State v. Michaels, supra,* is distinguishable from the instant case. In *Michaels* the trunk of the defendant's car was opened and searched, and a gambling device was discovered. In the present case, the evidence to which the defendant's motion to suppress was directed, consisted of the following items: (1) a chrome strip which originally came from defendant's car, but which was handed to the state trooper at the scene of the accident after the end of it had been removed from Airman Downs' body;

(2) a set of photographs of the defendant"s automobile taken after his arrest on the hit and run charge while the automobile was in the police parking lot near the Moses Lake jail where the defendant had himself parked the car; (3) an envelope containing some flecks of blue paint taken from the fender of defendant's car after his arrest for hit and run. None of these items of evidence could be considered the product of a search.

[1] No search under the constitutional interdiction takes place when items having evidentiary value are outside a building and in plain view, nor if they are in plain sight inside a building to which access has been lawfully gained. *See State v. LaPierre,* 71 W.D.2d 375, 428 P.2d 579 (1967), and cases cited therein. *See also* 47 Am. Jur., Search and Seizure § 20 (1943).

In *Tacoma v. Houston,* 27 Wn.2d 215, 219, 177 P.2d 886 (1947), we said:

> If the entry was lawful, then it was proper for the officers to testify concerning those things that were open and plainly visible to them. *State v. Llewellyn,* 119 Wash. 306, 205 Pac. 394; *State v. Miller,* 121 Wash. 153, 209 Pac. 9; *State v. Nilnch,* 131 Wash. 344, 230 Pac. 129; *State v. Nelson,* 146 Wash. 17, 261 Pac. 796; *State v. Parent,* 156 Wash. 604, 287 Pac. 662.

See also *State v. Rinkes,* 70 W.D.2d 825, 828, 425 P.2d 658 (1967).

The arrest for speeding, being a lawful arrest, the arresting officer was not required to close his eyes or turn his back in order to avoid seeing evidence of a hit and run offense. As we said in *State v. Roff,* 70 W.D. 2d 584, 588, 424 P.2d 643 (1967):

> It has been said that police officers "Once in the apartment lawfully, . . . need 'not look the other way, or disregard the evidence [their] senses bring [them]', for 'mere observation' does not 'constitute a "search" '." *United States v. Scott*, 149 F. Supp. 837, 841 (D.C. Cir. (1957)).

The appellant claims that there was error in the admission of evidence in the superior court. He contends that he was denied his constitutional right of confrontation with witnesses against him under article 1, section 22 of the Washington State Constitution. This claim of error is based upon the admission in evidence of the tape-recorded testimony of two of the state's witnesses in justice court who there testified under oath, were cross-examined by defendant's present counsel, and who at the time of the trial in the superior court were outside the state of Washington. His claim of error is not based on the use of the tape recording, rather than the oral testimony of the justice of the peace, in fact, he expressed approval of the form in which the testimony was presented. He claims, however, that it was error to use the former testimony without first showing that the state had attempted to procure the return of the witnesses from out of state under the provisions of RCW 10.55.060, the uniform act to secure the attendance of witnesses from without a state in criminal proceedings.

In *State v. Ortego*, 22 Wn.2d 552, 563-64, 157 P.2d 320, 159 A.L.R. 1232 (1945), we stated three requirements for use of former testimony in a subsequent trial as follows:

> (1) that the witness whose testimony is sought

> to be produced is unavailable because of his death, insanity, or physical disability preventing his appearance in court, *or his absence from the state or jurisdiction of the court without the connivance of the party seeking to introduce the testimony of such witness,* or his absence when after diligent search and due inquiry he cannot be found, or his absence resulting from some other contingency of equal preventive force and gravity; (2) that such witness was sworn and testified in the former trial, and that the accused was present and had an opportunity for cross-examination; and (3) that the person through whom the testimony of the absent witness is sought to be reproduced will state, under oath, that he heard, remembers, and can relate the substance of all the testimony of such absent witness, or at least the substance of all such testimony on the particular subject sought to be proved. (Italics ours.)

These three prerequisites were met in this case.

[2] There is nothing in RCW 10.55 which supports the defendant's contention. The statute merely sets up machinery whereby witnesses out of this state may be brought into the criminal courts of this state from states having reciprocal provisions. Nothing in RCW 10.55 makes its use mandatory nor its attempted use a condition precedent to use of the procedure approved in *State v. Ortego, supra,* and we do not find that the defendant's constitutional right of confrontation was denied under the facts of this case by the state's failure to first attempt to procure return of the two witnesses under the uniform act.

This is a question of first impression in this state, but the Supreme Court of Arizona in *State v. Jordan,* 83 Ariz. 248, 320 P.2d 446 (1958), reached the same

conclusion even though the location of the witness in another state having a reciprocal uniform act was known. The same conclusion was reached in *State v. Leggroan,* 15 Utah 2d 153, 389 P.2d 142 (1964); also in *People v. Serra,* 301 Mich. 124, 3 N.W.2d 35 (1942); *People v. Hunley,* 313 Mich. 688, 21 N.W.2d 923 (1946); *People v. Day;* 219 Cal. 562, 27 P.2d 909 (1933); *People v. Daboul,* 234 Cal. App. 2d 800, 44 Cal. Rptr. 744 (1965); and *People v. Dozier,* 236 Cal. App. 2d 94, 45 Cal. Rptr. 770 (1965). The only contrary authority we find is *State v. Tyler,* 187 Kan. 58, 353 P.2d 801 (1960). In the *Tyler* case, the witness was in an adjoining state and could have been reached by an automobile trip of about 3 hours. It may also be noted that the Supreme Court of Kansas has now receded from the position taken in *State v. Tyler, supra,* and would not apply the rule of that case in a situation similar to the facts present here. *State v. Lesco,* 194 Kan. 555, 400 P.2d 695 (1965).

In the present case the two witnesses' whereabouts were not definitely known, they had jumped bail on a vagrancy charge several months before the superior court trial, had gone to Clovis, New Mexico, and their bail bondsmen could not locate them.

The objections of the defendant to the admission of other items of evidence were without merit.

Nor is there merit in the defendant's assignments of error Nos. 12, 13 and 14, challenging the sufficiency of the evidence to sustain a conviction.

The final assignment of error is directed to instruc-

tions given and refused, particularly to instruction No. 8, given as follows:

> You are instructed that it is immaterial insofar as this case is concerned whether or not the Defendant knew that he struck Airman, Ed Downs.
> The law imposes upon every driver of a motor vehicle along a public highway the duty to pay sufficient attention to his driving, that he will see and know if his vehicle strikes persons upon a public highway.

RCW 46.52.020 sets out the duty imposed upon the operator of a vehicle who has become involved in an accident. Briefly, the duties imposed, if injury or death result, or if another attended vehicle is damaged, are as follows: (1) He shall stop at or as near the scene of the accident as possible; (2) he shall return to the place where the accident occurred and remain until the requirements of subsection (3) be fulfilled. Subsection (3) requires that the operator of the vehicle give his name, address and vehicle license number, exhibit his vehicle operator's license and render any person injured reasonable aid, including arrangements for transportation of the injured to a place where medical facilities are available.

The statute is silent on the matter of knowledge of the accident on the part of the operator of a vehicle as a necessary element of the offense defined. The question has not previously been before this court. The following text statement from 7 Am. Jur. 2d *Automobiles and Highway Traffic* § 247 (1963) indicates, however, that the question has been before the courts of several other states. The text reads:

> Under a statute which imposes a duty upon a motorist involved in an accident causing damage or injury to another to stop, identify himself, etc., knowledge of the damage or injury is generally a prerequisite to a conviction for the violation thereof, even though the statute does not expressly require knowledge on the part of an accused motorist. Knowledge of such damage or injury is, of course, particularly an element of the offense under a statute which imposes such duty upon a motorist who "knowingly" collides with or causes injury to any person. However, it is not absolute and positive knowledge which must be shown before the offense is proven, but rather it need only be shown that the circumstances were such that a reasonable man would have believed that an accident had occurred resulting in damage or injury to another. In other words, if an injury is inflicted under such circumstances as would ordinarily induce the belief in a reasonable person that injury would result, or had resulted, from the accident or collision, then it is the duty of the motorist too stop and otherwise obey the mandate of the statute.
>
> In a few jurisdictions it has been held that it is not necessary to allege and prove knowledge to convict a motorist of violation of a statute requiring motorists involved in accidents to stop, identify themselves, etc., where the statute does not make knowledge of the accident a part of the offense. It is reasoned that in most cases it would be impossible for the state to prove scienter beyond a reasonable doubt, while the accident itself might properly be proven. (Footnotes omitted.)

See also Annot. 16 A.L.R. 1425; 66 A.L.R. 1228, and 101 A.L.R. 913. Leading cases supportive of the majority position include *State v. Parish,* 79 Idaho 75, 310 P.2d 1082 (1957); *People v. Rallo,* 119 Cal. App. 393, 6 P.2d 516 (1931); *People ex rel. O'Connor v.*

Hirsch, 241 App. Div. 712, 269 N.Y.S. 830 (1934); *Behrens v. State,* 140 Neb. 671, 1 N.W.2d 289 (1941); *Scott v. State,* 90 Tex. Crim. 100, 233 S.W. 1097, 16 A.L.R. 1420 (1921); *Herchenbach v. Commonwealth,* 185 Va. 217, 38 S.E.2d 328 (1946); *People v. Holford,* 63 Cal. 2d 74, 403 P.2d 423 (1965).

[3] It was error to submit to the jury instruction No. 8. The statute RCW 46.52.020 imposes upon the driver of a vehicle a positive, affirmative course of action; it specifically designates several acts following the accident which the operator of the vehicle must do to avoid the statutory penalty. It is inconceivable that the legislature intended that punishment would be imposed for failure to follow the course of conduct outlined, if the operator of the vehicle was ignorant of the happening of an accident. If he knowingly has an accident, such as the statute mentions, and does not stop, he has violated the statute.

Generally, the state must rely upon circumstantial evidence to prove knowledge. The legislature has recognized the difficulty of proving knowledge in those cases where it is a necessary element of the criminal offense. RCW 9.01.010, part of our criminal code, contains this provision:

> [K]nowledge of any particular fact may be inferred from the knowledge of such other facts as should put an ordinarily prudent man upon inquiry.

In *State v. Salzman,* 186 Wash. 44, 47, 56 P.2d 1005 (1936), we said:

Guilty knowledge is an element in these cases which can rarely be proven by direct and positive testimony. Ordinarily it must be found by inference fom all the facts and circumstances surrounding the transaction.

In *State v. Parish, supra,* the court said at 80:

Knowledge on the part of the accused of the accident resulting in injury to another person does not require a showing by the state, by direct testtimony, that the accused actually knew that the motor vehicle he was driving had struck some one. All of the facts and circumstances indicative of knowledge of such an accident may be considered by the jury in its determination of the fact of knowledge. In People v. Pahner, supra, it is stated [10 Cal. App. 2d 294, 51 P.2d 1144]:

"It is hardly to be expected that direct testimony could be obtained in such a case as this to the effect that a defendant knew that he had injured another person. From the nature of the case, such knowledge on the part of a driver, although a necessary element of the offense, must usually be proved by showing the surrounding facts and circumstances which indicate such a knowledge."

In *People v. Holford, supra,* the court said at 80:

Usually, however, such knowledge must be derived from the surrounding facts and circumstances of the accident. . . . Yet the driver who leaves the scene of the accident seldom possesses actual knowledge of injury; by leaving the scene he forecloses any opportunity to acquire such actual knowledge. Hence a requirement of actual knowledge of injury would realistically render the statute useless. We therefore believe that criminal liability attaches to a driver who knowingly leaves the scene of an accident if he actually knew of the injury or if he knew that the accident was

of such a nature that one would reasonably anticipate that it resulted in injury to a person. (Footnote omitted.)

[4] The final question for determination is whether prejudice, requiring a new trial, resulted to the defendant from the giving of instruction No. 8. The rule is now definitely established in this state that the verdict of the jury in a criminal case will be set aside and a new trial granted to the defendant, because of an error occurring during the trial of the case, only when such error may be designated as prejudicial. *State v. Hazzard,* 75 Wash. 5, 134 Pac. 514 (1913); *State v. Gaines,* 144 Wash. 446, 258 Pac. 508 (1927); *State v. Britton,* 27 Wn.2d 336, 178 P.2d 341 (1947); *State v. Clayton,* 32 Wn.2d 571, 202 P.2d 922 (1949); *State v. Moore,* 35 Wn.2d 106, 211 P.2d 172 (1949); *State v. Wilson,* 38 Wn.2d 593, 231 P.2d 288 (1951); *State v. Gellerman,* 42 Wn.2d 742, 259 P.2d 371 (1953); *State v. Mesaros,* 62 Wn.2d 579, 384 P.2d 372 (1963).

A prejudicial error may be defined as one which affects or presumptively affects the final results of the trial. *State v. Britton, supra.* When the appellate court is unable to say from the record before it whether the defendant would or would not have been convicted but for the error committed in the trial court, then the error may not be deemed harmless, and the defendant's right to a fair trial requires that the verdict be set aside and that he be granted a new trial. But, where the defendant's guilt is conclusively proven by competent evidence, and no other rational conclusion can be reached except that the defendant is guilty as charged, then the conviction should not be set aside because of

unsubstantial errors. 5 Am. Jur. 2d *Appeal and Error* § 786 (1962). To determine whether prejudice has resulted, it is necessary that the appellate court examine the entire record. *State v. Mesaros, supra*; *State v. Britton, supra.*

We are convinced, from our examination of the record in this case, that no such prejudicial error resulted from the giving of instruction No. 8. The record discloses that there was no dispute in the evidence presented to the jury with respect to the happening of events upon which the criminal charge was based. The defendant did not take the witness stand, and he adduced no testimony in his own behalf except three character witnesses. This is not a case of something being hit with the extreme end of a bumper or perhaps brushed with a fender, *i.e.*, a case in which the impact might escape the attention of the driver. Here, the defendant hit Ed Downs from the rear, embedding a piece of chrome in his buttocks. The blow was so terrific that the motorcycle was thrown 75 feet; the rider, 110 feet. The car came into contact with the motorcycle just below the car's right front headlight. There can be no question that the motorcycle was revealed by the headlights. None of these facts were disputed, there was no evidence to the contrary, and, under this state of the evidence, no decision other than guilty as charged could have been reached by the jury. Therefore, no prejudicial error resulted from the giving of instruction No. 8. The conviction on both the speeding charge and the hit-and-run charge must be affirmed.

FINLEY, C. J., HILL, WEAVER, and HALE, *JJ.*, concur.

APPENDIX B:

Appellant's Petition for Rehearing.

NOW RESPECTFULLY, COMES CLAUDE W. MARTIN, Appellant and petitions the Supreme Court for a re-hearing of the above-entitled cause:

1.

The Departmental opinion was filed herein on April 25, 1968. Time within which to file petition for rehearing was extended to June 17, 1968, by the Chief Justice.

That a rehearing of the above-entitled cause should be granted for the reason and upon the following grounds:

1. The Departmental opinion holds that knowledge of an accident is an essential element of the crime of "hit and run", but further holds that it is not prejudicial error to instruct the jury as a matter of law that knowledge of the accident on the part of the driver is immaterial.

2. By defendant's proposed Instruction No. C, the defendant requested and the trial court denied the defendant's request that the jury be instructed that knowledge was an essential element of the crime charged. Defendant's proposed Instruction No. C is a correct statement of the law.

3. After the case was closed and after the trial court had handed its instructions to counsel containing a correct statement of the law, trial court elected, at the request of the State, to withdraw the instruction which informed the jury that the State

was required to prove knowledge on the part of a driver, and submitted an erroneous instruction, (Instruction No. 8) which informed the jury in the effect that knowledge was not an essential element of the crime charged. Defendant was thereby deprived of his defense.

4. Instruction No. 8, is quoted as follows:
"You are instructed that it is immaterial insofar as this case is concerned, whether or not the defendant knew that he struck Airman, Ed Downs.

The law imposes upon every driver of a motor vehicle along a public highway the duty to pay sufficient attention to his driving, that he will see and know if his vehicle strikes persons upon a public highway."

5. The instruction as underlined was underlined by the Jury and controlling emphasis put thereon by the jury.

6. The first ballot of the jury resulted in seven votes for acquittal and five votes for conviction. A verdict of not guilty would have been entered for the defendant, but for the giving of Instruction No. 8 and the failure to give defendant's proposed Instruction No. C. (See Affidavits of jurors attached hereto)

7. To follow the Departmental opinion would suggest the relative unimportance of submitting to the jury instructions containing correct statements of the law.

8. While the form of an instruction is largely within the discretion of the trial court, the trial court has a duty as a matter of law and defendant has the right as a matter of law to have the jury receive a correct statement of law in the form of instructions. The trial Court admonishes the jury

and the jury must follow the law as contained in the instructions.

9. The State did not raise the question of whether or not the erroneous instruction was prejudicial. This proposition was never argued by the State at the trial court or Supreme Court level, and no citation of authority was submitted by the State on this subject.

10. The Departmental opinion holds that the knowledge of the accident may be proved by circumstantial evidence, but there is no evidence that the defendant was driving the automobile involved in the accident. The prejudicial effect in giving Instruction No. 8 is emphasized by the fact that the jury is compelled to infer, in the absence of the evidence, that the defendant was driving the automobile and then place inference on inference and infer that the defendant had knowledge of the accident.

11. Contrary to the statements contained in the State's brief, the defendant was not seen driving the automobile claimed to have been the hit-and-run vehicle. The evidence by the State's witnesses, is in direct contradiction of the statements contained in the State's brief to the effect defendant was seen driving the vehicle.

12. The defendant has been denied a fair trial, deprived of his constitutional rights under the Federal and State Constitution and deprived of due process.

13. Inherent justice requires reversal where a trial Court refuses to give a defendant's proposed instruction which is a correct statement of the law relative to an essential element of a crime charged and over objection gives an instruction which is an erroneous statement of the law.

14. The complaint alleged that the acts of the

defendant were knowingly committed. By stating knowledge was immaterial, Instruction No. 8 resulted in an erroneous statement to the jury of the offense charged and deprived the defendant of his proper defense by informing the jury that lack of knowledge is no defense. The offending instruction is not only a comment on the evidence, but in fact prevented the defendant from making his defense to the crime charged.

II.

ARGUMENT IN SUPPORT OF REHEARING

The erroneous Instruction No. 8 changed the theory of the State's case. This instruction was given after the case closed and after the State, defendant and the Trial Court had prepared and filed proposed instructions to the contrary. The State insisted that Instruction No. 8 be given to prevent defendant's counsel arguing to the jury that there was no proof of knowledge on the part of the defendant of the accident in question.

Instruction No. 8 became the law of the case. Defense counsel was under a duty to refrain from invading the ruling of the court, did not invade the ruling of the court in argument and defendant was therefore denied his right to have his counsel argue that the defendant had no knowledge of the accident and that the State had failed to prove the defendant had knowledge of the accident. Not only was the defendant deprived of his right to argue absence of knowledge, but the jury was informed that knowledge of the accident on the part of the defendant was immaterial. The Departmental opinion cites: *State v. Hazzard*, 75 Wash. 5, 134 Pac. 514 (1913); *State v. Gaines*, 144 Wash. 446, 258 Pac. 508 (1927); *State v. Britton*, 27 Wn.2d 336,

178 P. 2d 341 (1947); *State v. Clayton,* 32 Wn.2d 571, 202 P.2d 922 (1949); *State v. Moore,* 35 Wn.2d 106, 211 P.2d 172 (1949); *State v. Wilson,* 38 Wn.2d 593, 231 P.2d 288 (1951); *State v. Gellerman,* 42 Wn.2d 742, 259 P.2d 371 (1953); *State v. Mesaros,* 62 Wn.2d 579, 384 P.2d 372 (1963), in support of its ruling that the error was not prejudicial. None of the cases cited are in point in the instant case. First, a majority of the cases cited are not based on an erroneous instruction, Second, the majority of the cases cited show trivial errors, Third, in none of the cases cited was the jury instructed that an essential element of a crime charged is immaterial.

In *State vs. Hazzard, supra,* the jury was properly, not improperly instructed. The claim in Hazzard was predicated upon the use of a medical text which was not a standard text. The error, if any, was trivial, and was invited by the defendant since the defendant initiated the use of the text. The testimony with reference to the text came in under a general, not a specific objection. At page 24 the Court recited in referring to the instructions given the jury:

> "We have considered the instructions with care and in our opinion, the instruction given, fully, clearly and accurately covered the laws of the case."

In the Martin case, Instruction No. 8 did not clearly and accurately inform the jury the law of the case. It is an incorrect statement of the law and is error. Defendant's proposed Instruction No. C. which fully, clearly and accurately set forth the law of the case was refused.

In *State vs. Gaines, supra,* the claimed error was not based upon the giving or refusing of an instruction but in the refusal of the trial Court to permit defendant's counsel to interview a State's witness. The refusal to permit the interview was not error. The Court did hold that assuming an error had occurred, the vital part of the testimony had been previously disclosed in an interview in the Sheriff's office in the presence of the Sheriff, the defendant and one of his attorneys. The claimed error was trivial.

In *State v. Britton, supra,* the defendant's claimed error in a first-degree murder case was based upon the giving of an instruction on the subject of excuse or justification for the homicide. There was no evidence in the case which would justify an instruction on excuse or justification. If the instruction was erroneous it prejudiced the State and not the defendant. However, the Court does in Britton define harmless error at page 341 as follows:

> "A harmless error is an error which is trivial, or formal, or merely accidental, and was not prejudicial to the substantial rights of the party assigning it, *and in no way* affected the final outcome of the case." (Italics supplied.)

The offending instruction was neither trivial, formal or academic. The defendant's substantial rights were prejudiced. The instruction affected the outcome of the case and resulted in the verdict against the defendant. What could be more prejudicial to a defendant in a jury case than to inform the jury that lack of knowledge is in fact no defense to the crime charged.

It is here noted that the defendant Martin cited and the Departmental opinion follows the holding in *State vs. Parrish,* 79 Idaho 75, 310 P.2d 1082 (1957), and adopts therefrom quotations which indicate that knowledge of an accident may be proved by circumstantial evidence. However, the importance of knowledge as an element of the crime of hit and run is emphasized by the following language also quoted from *Parrish, supra*:

> "*The matter of knowledge on the part of the accused,* under consideration here, *cannot be classified as technical or trifling* or one of variance, *since knowledge appears to be a necessary element of the crime* attempted to be charged and knowledge was not alleged." (Italics supplied.)

The Martin case is not a case in which the Court instructed the jury that knowledge of the accident on the part of the defendant could be proved by circumstantial evidence or inferred from other facts in the case. The trial Court erroneously instructed the jury that knowledge was immaterial and withdrew the question of knowledge from the consideration of the jury and in effect informed the jurors that they were to assume that the defendant was operating the automobile and that his knowledge could be inferred; that knowledge of the defendant of the accident was not required to be proved. It is not logical and in effect, incongruous to state that the jury disregarded the instruction of the Court and found that the defendant had knowledge of the accident, even though instructed that knowledge was immaterial. Any defendant is deprived of his substantial constitutional right of trial

by jury when the jury is erroneously instructed on one of the basic elements of the crime charged.

In an early case, *State v. Cushing,* 14 Wash. 527, 45 Pac. 145, (1896), the language observed at page 531 supports defendant Martin's claimed error for the refusal to give proposed Instruction No. C. in the following language:

> "Not only does the instruction under consideration contain a correct statement of the law, but it was applicable to the evidence, and it was the right of the defendant to have it or some equivalent instruction submitted to the jury."

It was the right of the defendant Martin to have defendant's proposed Instruction No. C or some equivalent instruction given to the jury. Again quoting from *Cushing, supra.,* at page 534:

> "It will not do to say that inasmuch as it appears from the verdict that the jury disbelieved the testimony of the appellant, the instruction, if given, would have been unavailing. What the jury would have done had they been furnished with the proper lights for their guidance, can only be conjectured. Appellant was entitled to have this instruction given to the jury as a matter of law necessary for their information in arriving at a verdict, and especially so in view of the nature of the charge and the testimony adduced in its support.

The decision of the Court in *State v. Clayton, supra.,* cited in the Departmental opinion, must be weighed in light of the language found at page 572:

> "Appellant does not contend that this instruction constitutes an incorrect statement of the law.

> In fact, it is conceded that, under the law as it has existed in this state, since the enactment of . . . corroboration of the prosecuting witnesses in cases of this nature is not required. (Cited cases omitted). Appellant challenges the instruction solely upon the ground that it constitutes a comment on the evidence . . . "

In *State v. Moore, supra.,* a conviction of vagrancy i.e., keeping a house of prostitution was affirmed. The claimed error was based upon admission of evidence elicited by the prosecution in attempting to identify whether the lady prostitutes came from the Cresent Rooms in Pasco or from Long House. In order to properly identify and draw a distinction between the two groups of prostitutes arrested the same night during a raid on two houses it was necessary to draw a distinction between the group who were sans underclothing and the group who were not. The relative state of dishabille of the two groups was admitted to identify which girls came from and occupied the Cresent Rooms operated by defendant and which did not. At most the evidence, if erroneously admitted, was irrelevant and immaterial. The Court held, however, that the *instruction* complained of was not erroneous. (italics added).

State v. Wilson, supra., is not a case of giving an erroneous instruction. The error was based upon a claim of the defendant that he was restricted in his explanation as to the reason for his flight from the State of Washington and his movement from place to place in Portland. The claimed error was without merit and the reason stated therefore is set forth at page 614:

> "We are therefore of the opinion that the error complained of was not prejudicial, because appellant's explanation of the reasons for their flight and the circumstances connected therewith was before the jury. (cited cases ommitted)."

The actual explanation in the Wilson case pertaining to flight was not important, particularly where Utah's fingerprints on the recently opened bottle were found within a few minutes of the kidnapping and this was conclusive evidence of his presence at the time and place of the kidnapping which was the important question to determine.

State v. Gellerman, supra, reversed a conviction of sodomy and this decision supports the defendant Martin's position. In the Gellerman case, the instructions used the words "scheme" "desire or intent" instead of the words "scheme" "design or intent". The verdict of the jury was reversed because objection was made to the instruction. The error was called to the attention of the trial court before the case was submitted and no attempt was made to correct the error. The Court stated at page 753:

> " Thus the error could have been readily cured, but nothing was done by the State or by the Court to correct it."

In State v. Martin, the prosecution and the trial court took a further step. Error was affirmatively injected into the case before argument of counsel or deliberation of jury and the trial court refused to give the requested instruction which was a correct statement of law. The State made no attempt in the Su-

preme Court or at trial to show the instruction was not prejudicial. The State maintained at all times that Instruction No. 8 was a correct statement of law. The State further maintained that the legislature intended to remove knowledge as an element of the crime of hit and run. At no time has the State submitted any citation suggesting that the error claimed by defendant Martin was not prejudicial. As stated in *Gellerman* at page 754:

> "No attempt is made by the State in this Court to demonstrate that the substitution of the word "desire" for the word "design" was not prejudicial to the appellant."

In *State v. Mesaros, supra,* conviction of murder in the first-degree was affirmed. The alleged error was based upon the claim that the defendant was limited in his cross-examination of an expert on a text, without the witness testifying that the book was an authorative or standard text. The error, if any, was held harmless for the reason that the testimony attempted to be elicited had already been admitted into the record.

There is a valid distinction as set forth in *State v. Parrish, supra,* between the rule of circumstantial evidence and the positive rule of law i.e. in the case of (hit and run) and the necessarily element of knowledge of the crime charged. It does not become a question of evidence, circumstantial or otherwise. This is a case in which the jury is told, knowledge from whatever source in the evidence derived is not material and therefore need not be proved.

In the case of *People v. Putnam,* 323 Mich. 374, 35 NW 2d 279 (1948) a conviction for failing to stop at the scene of an accident was reversed. The information did not charge knowledge on the part of the defendant that his automobile had been involved in an accident and the trial Court failed to instruct the jury it must find beyond a reasonable doubt that the defendant knew his automobile had been involved in the accident before it could enter a verdict of guilty. The controlling language in the *Putnam* case apropos of Martin, is found at Pages 280-281 of the Reporter:

> "The jury was not instructed that it must find, beyond a reasonable doubt, the fact to be that the defendant knew his automobile had been involved in an accident. That issue was not submitted to the jury."
>
> "*We find,* in the record before us, *testimony from which the jury might have concluded,* beyond a reasonable doubt, *that the defendant knew his vehicle had been involved* in an accident resulting in injury or death to a person, *if such an issue of fact had been submitted to it for its* determination." (Italics supplied.)
>
> "It is not the province of the Court to usurp the proper function of the jury in determining issues of fact. It is not for the Court to say that the jury would have so found, if the issue had been submitted to it."

In *People vs. Gory,* 170 P 2d 433 (Calif. 1946) the California Court reversed as prejudicial error the failure to instruct the jury that knowledge was a necessary element of the crime charged.

At Page 438 of the Reporter:

> "It may be possible to argue that taking the instructions as a whole, they were sufficient to have informed the jury in a general roundabout way that before defendant could be convicted . . . the evidence must show his *knowledge of the presence* of said property in his box; but since knowledge, in that limited sense, is an essential element of offense, he was entitled under the circumstances to a specific instruction, such as the requested instruction 12, to clarify the situation."
>
> " . . . *we are convinced,* under the state of the evidence presented on this essential element of knowledge, *that such error must be treated as prejudicial.*" (Italics supplied.)

It follows that the affirmative error in Martin is more flagrant and prejudicial than the negative omission in *People vs. Gory, supra.*

Even though the evidence in *People vs. MacPherson,* 323 Mich. 438, 35 NW 2d 376 (1949) was sufficient to justify the verdict of guilty, the verdict was set aside based as reversible error for failing to instruct the jury that the defendant could not be convicted unless he knew his automobile had been involved in the accident. The Michigan Court at Page 381 of the Reporter related:

> "It is the duty of a trial Court in charging a jury as to the elements of an offense, and, what must be proved in order to establish such elements, to do so accurately. The proper protection of the rights of an accused on trial requires this to be done." (Cited case omitted.)

Page 382:

> "On this record the Court may not say that the

driver of the automobile involved in the fatal accident knew when he left the scene that he had struck and injured a person. The matter of such knowledge was one to be determined by the jury on the basis of the proofs."

"Under the situation here presented, the failure to cover in the charge the element of knowledge . . . was error."

"*The practical result,* because of the omission, *was an erroneous statement of the offense.*" (Italics supplied.)

"We are, in consequence, dealing with an erroneous charge rather than one that merely fails to define a term, cover an incidental issue involved in the case, or discuss a question concerning which there is no dispute." (Cited cases omitted.)

In the case at bar the trial Judge went farther than than in the MacPherson case and informed the jury that knowledge was immaterial and refused defendant's instruction which would require the jury to find knowledge before it could convict. In the record the only testimony pertaining to knowledge proves lack of knowledge; and that the defendant Martin had no knowledge of the accident. (St. 71, 96, 97, 98, 107, 109, 110, 114.) The evidence of defendant's lack of knowledge is not disputed.

In *Oosterwyk vs. State,* 242 Wis. 398, 8 NW 2d 346 (1943) the Supreme Court of Wisconsin reversed a conviction for receiving stolen property notwithstanding there was sufficient evidence to support the finding of guilt where it appeared that the trial Court in its instructions had not made it clear to the jury that it was essential they find beyond a reasonable doubt

that the defendant knew the property was stolen. The Court stated at Page 349 of the Reporter:

> "Such guilty knowledge, or its equivalent, guilty belief, may be proven by circumstantial evidence; but it is not sufficient that such circumstantial evidence convinces the jury beyond a reasonable doubt that the defendant ought to have known that the property was stolen; it must go a substantial step further and satisfy them that he *did* know or believe."

In Martin, the language contained in Instruction No. 8 violates this precept.

In *State vs. Snell,* 177 Neb. 396, 128 NW 2d 823 (1964) the Nebraska Court reversed a conviction for hit-and-run. We find the following at Page 828 of the Reporter:

> "In *Behrens vs. State,* 140 Neb. 671, 1 NW 2d 289, this Court held that knowledge that an accident has happened and that an injury has been inflicted is an essential element of the crime of leaving the scene of a personal injury accident."
>
> "As to this it may be said that under this statute an automobile driver is not criminally liable for failure to stop and failure to render aid to an injured person when he does not know that an accident has happened, an injury has been inflicted, or a death has occurred." (Cited cases omitted.)
>
> "Further, lack of such knowledge constitutes a proper defense. *Olson vs. State,* 36 Ariz. 294, 285 P 282. It is a question of fact and not of law. Although we have this question of knowledge on part of the accused in this case as a matter of conflicting evidence, he was entitled to have his theory of this transaction submitted to the jury by a proper instruction, and a refusal by the district court to do so constituted error."

The Nebraska trial Court had instructed the jury to the effect that the defendant should be found "not guilty" if he had no knowledge of the accident unless under the circumstances *"he should have known"* of the accident. The Court stated:

> "The instruction is erroneous because it substitutes the elements of negligence for the element of knowledge which is required under the *Behrens* case."
>
> "The evidence in this case was sufficient to sustain a finding of knowledge on the part of the defendant, but the jury was instructed that it might find the defendant guilty even though it should find that the defendant did not know that he had been involved in an accident in which a person had been injured. The instruction was erroneous and it required that the judgment be reversed."

The second paragraph of Instruction No. 8 directs the jury to assume that the defendant was the driver of the vehicle, that he is charged with knowledge of the accident, and thereby injected a negligence instruction into the case, as was erroneously done in *State vs. Snell, supra.*

The defendant, Martin, was deprived of his right to have the jury determine whether or not knowledge was proved. A recent Washington case sets out the test. In *State vs. Dana,* 73 W. D. 2d, 537,540,541 (1968), the Court observed:

> "If instructions are such as are readily understood and not misleading to the ordinary mind, they are sufficient." (Cited cases omitted.)

The Martin trial jurors were instructed by Instruction No. 3 that the State had alleged the operation of

the vehicle was knowingly accomplished, and by Instruction No. 8 that knowledge of the accident was immaterial. Nothing could have been more confusing to the jury.

A further test by which it is determined whether or not an instruction results in prejudicial error is also found in *State v. Dana, supra,* where our Washington Court stated:

> "The test of the sufficiency of instructions given on the theory the case has been held to be whether, from the instructions given, counsel may satisfactorily argue the theory of the case to the jury." (Cited cases omitted.)

Without invading the ruling of the Court and inviting contempt, defense counsel could not and did not argue defendant's theory that the defendant had no knowledge of the accident. In fact, Instruction No. 8 was given to prevent counsel for defendant from arguing that there was no evidence of knowledge on the part of the defendant Martin of the accident which is the basis for the hit and run charge. Nothing could have been more prejudicial to the defendant than this error imposed upon the trial Court and the defendant. This prejudicial error was invited by the State.

III.

CONCLUSION

1. The Departmental opinion holds that knowledge of an accident is an essential element of the crime of "hit-and-run."

2. The jurors were instructed that knowledge of an accident, an essential element of the crime, was immaterial.

3. The Departmental opinion holds that the giving of Instruction No. 8 is erroneous but harmless error.

4. The acknowledged error is prejudicial because:

a. The jurors were misinformed on a basic element of the crime charged.

b. The jury was confused as to the elements of the crime the State was required to prove.

c. The instruction resulted in an erroneous statement of the offense charged.

d. Lack of knowledge of the accident was a proper defense to the crime charged, but the jurors were informed in effect that lack of knowledge is no defense to the crime charged.

e. Instruction No. 8 is an erroneous comment on the evidence as well as an error at law.

f. The offending instruction was injected at the insistence of the State and substitutes a "negligence standard of duty" instruction in lieu of the requirement that the State prove knowledge.

WHEREFORE, PETITIONER PRAYS:

1. That a re-hearing be granted;

2. That upon re-hearing the Court dismiss this cause,

or, in the alternative, grant defendant a new trial.

Respectfully submitted,
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STATE OF WASHINGTON
County of Grant ss.

THE UNDERSIGNED, ROBERT M. HILL, being first duly sworn on oath, deposes and says:

I was a member and foreman of the jury in Grant County in the case of the State of Washington vs. Claude W. Martin.

Before retiring to the jury room to deliberate the case, the jury was instructed by the Court to read and follow the written instructions to be given us, as they defined the law as it applied to this case.

One of the principal items discussed during our deliberation was whether or not the defendant had to know he struck Mr. Downs before he would be guilty. The jury was confused because one instruction stated the defendant was charged with knowing he had an accident, and another instruction stated it was immaterial whether or not the defendant knew he struck Mr. Downs.

There were extensive discussions as to whether knowledge of the accident was necessary. We deliberated late at night and past noon the following day.

Until the instruction saying knowledge was immaterial was read and reread I was of the opinion that there was not enough evidence to prove knowledge of the accident.

A portion of Instruction No. 8 was underlined in the jury room, and the content of this instuction was one of the factors which influenced me to vote against the defendant.

s/ROBERT M. HILL

SUBSCRIBED and SWORN to before me this 11th day of June, 1968.

s/OLIVER L. CLICK,
Notary Public in and for the State of Washington, residing at Ephrata.

AFFIDAVIT

STATE OF WASHINGTON
County of Grant ss.

THE UNDERSIGNED, EARL E. DAVEY, being first duly sworn on oath, deposes and says:

I was one of the jurors in the case of State vs. Claude W. Martin, Grant County No. 2806, Grant County, Washington.

JACK W. SAULLS and myself were the two jurors that kept the jury out over night because we were of the opinion the State had not proven that Mr. Martin knew that he had struck Airman Ed Downs.

I finally changed my vote from acquittal to conviction because of Instruction No. 8, which reads as follows:

> "You are instructed that it is immaterial insofar as this case is concerned whether or not the Defendant knew that he struck Airman Ed Downs.
>
> The law imposes upon every driver of a motor vehicle along a public highway the duty to pay sufficient attention to his driving, that he will see and know if his vehicle strikes persons upon a public highway."

In other words we would have voted for an acquittal except for the fact that the instruction seemed to say that knowledge was immaterial.

s/EARL E. DAVEY,

SUBSCRIBED and SWORN to before me this 12th day of June, 1968.

s/MILTON P. SACKMANN
Notary Public in and for the State of Washington, residing at Ritzville.

AFFIDAVIT

STATE OF WASHINGTON
County of Grant ss.

THE UNDERSIGNED, JACK W. SAULLS, being first duly sworn on oath, deposes and says:

I was one of the jurors in the case of State vs. Claude W. Martin, Grant County No. 2806, Grant County, Washington.

EARL E. DAVEY and myself were the two jurors that kept the jury out over night because we were of the opinion that the State had not proven Mr. Martin knew that he had struck Aiman Ed Downs.

I finally changed my vote from acquittal to conviction because of Instruction No. 8, which reads as follows:

> "You are instructed that it is immaterial insofar as this case is concerned whether or not the Defendant knew that he struck Airman Ed Downs.
>
> The law imposes upon every driver of a motor vehicle along a public highway the duty to pay sufficient attention to his driving, that he will see and know if his vehicle strikes persons upon a public highway."

In other words, we would have voted for an acquittal except for the fact that the instruction seemed to say that knowledge was immaterial.

s/JACK W. SAULLS

SUBSCRIBED and SWORN to before me this 12th day of June, 1968.

s/MILTON P. SACKMANN,
Notary Public in and for the State of Washington, residing at Ritzville.

REMITTITUR No. 39111

Grant County No. 2806

The State of Washington, Respondent, v. Claude W. Martin, Appellant.

The State of Washington to: The Superior Court of the State of Washington in and for Grant County.

This is to certify that the opinion of the Supreme Court of the State of Washington filed on April 25, 1968, became the final judgment of this court in the above entitled case on July 16, 1968. This cause is remitted to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule 5 5on Appeal, costs are taxed as follows: No cost bill having been filed, costs are deemed waived. The petition for rehearing was denied by an order dated July 16, 1968.
cc: Court Reporter

Mr. W. Walters Miller

Honorable Paul Klasen

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 17th day of July, A. D. 1968.

WILLIAM M. LOWRY, Clerk of the Supreme Court, State of Washington.

EXCERPT OF EXHIBIT 14

No. 1 N. on 17 approx. 30 mph No. 2 overtook No. 1 struck No. 1 in the left rear, then fled the scene, leaving driver of No. 1 laying in the ditch. No. 2 arrested approx 3 hours later.

Enforcement Action Name: Claude Martin.

Charge: Hit and Run 0147587.

Sign Here (Officer's Rank & Name) Trooper R. A. McBride (Personnel Number) 417 (District) 6 (Date of Report) 7/15/65.

EXCERPT OF EXHIBIT 15

Will Bachofner
Chief

Washington State Patrol
Headquarters
Olympia
September 16, 1965

Dear Mr. Martin:

" . . . Trooper McBride further indicated in his report that you were arrested approximately three hours after the accident for Hit and Run Driving, and it is with this information that we are asking that you complete an accident report as required by State Law."

. . .

Sincerely,
WILL BACHOFNER, Chief

SEARCHES AND SEIZURES

Amendment 4

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

RIGHTS OF ACCUSED IN CRIMINAL PROSECUTIONS

Amendment 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of teh nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

RIGHTS GUARANTEED

Amendment 14

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.